No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF ALASKA,
Petitioner,
v.
NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LEGISLATURE OF THE STATE OF ALASKA AND THE COUNCIL OF STATE GOVERNMENTS-WEST AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHARLES E. COLE
406 Cushman Street
Fairbanks, Alaska 99701
(907) 452-1124

THE COUNCIL OF STATE GOVERNMENTS-WEST
KENT BRIGGS
Executive Director
121 Second Street,
Fourth Floor
San Francisco, CA 94105
(415) 974-6422

CARTER G. PHILLIPS *
CHRISTOPHER D. MOORE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

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INTEREST OF *AMICI CURIAE*

Amici are the Legislature of the State of Alaska and the Council of State Governments-WEST.[1] Composed of 20 Senators and 40 Representatives duly elected by all Alaskan citizens, the Legislature has the duty under the Alaska Constitution to formulate and enact laws in the

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

best interests of the State and its constituents. The Council of State Governments-WEST ("CSG-WEST") is a nonpartisan association of western state legislators and legislative staff in 13 western states and four Pacific island governments. Its primary objectives are to provide a platform for regional cooperation and collaboration among western state legislatures and to strengthen the role of states within the federal system.

In the wake of the Ninth Circuit's startling decision, it is impossible to determine which geographic areas of the State are amenable to the laws of the State. The Legislature now faces the prospect of 226 distinct land-based, quasi-sovereign entities covering tens of millions of acres of the Alaskan landscape and claiming powers to tax, regulate economic affairs, and override existing state regulatory laws in various areas, including those protecting and preserving natural resources. This uncertainty cripples the Legislature's ability to regulate matters of vital importance to the citizens of Alaska and undermines its efforts to further the public interest.[2] In addition to hamstringing the Legislature, the confusing decision issued by the court of appeals will foment a "blizzard" of litigation over the State's and Native governments' respective spheres of authority. That litigation will sap the limited resources of both the State and the Native communities that unquestionably could be put to better use.

Amici endorse the State's petition in this case and believe that the State has convincingly demonstrated why the decision below warrants review by this Court. *Amici* are filing separately to focus the Court's attention on the extraordinary and harmful impact the decision will have

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[2] Ironically, this uncertainty may also discourage businesses, such as the contractor involved in this case, from engaging in development opportunities in these areas.

on the Legislature's ability to fulfill its responsibilities to all Alaskan citizens and to make clear that the impact of the decision in this case will be felt by legislatures in addition to Alaska's. The acute consequences to the legislative process of the decision below reinforce the strong case for certiorari already made by the State. For these reasons, the views of the *amici* should further inform the Court's judgment as to whether to grant the petition.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision disregards the traditional relationships between Alaska Natives, the State of Alaska, and the Federal Government and, as set forth in the State's petition, employs a six-part, "textured" inquiry that varies from the analyses and decisions of this Court and several courts of appeals regarding the meaning of "dependent Indian communities." The decision undercuts a major legal premise on which the Legislature has patterned its governance for much of the State and its citizens. And, as also described in the State's petition, the panel decision effects a sharp and unprecedented detour from the line of cases instructing that the existence of "dependent Indian communities" requires federal superintendence over land set aside for the use and occupancy of an Indian tribe, which simply does not describe—and never has described—the situation in Alaska.

1. The jurisdictional implications of this case for Alaska are huge. The Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*, authorized the federal government to convey patents covering tens of millions of acres of land to state-chartered regional and village corporations. 43 U.S.C. §§ 1606, 1607. This 44 million acres of land—all of which is now potentially "Indian country" under the Ninth Circuit's rationale—is dispersed widely throughout the State and includes 226 villages containing significant Native and non-Native pop-

ulations. See Pet. 4-5; 58 Fed. Reg. 54,364.[3] The establishment of a particular area as Indian country will affect, among many other things, management of education, protection of natural resources, aid to local and municipal governments, the provision of services, and the amount and degree of economic opportunity. Accordingly, while the amount of land at issue is by itself of a magnitude sufficient to justify granting the petition, *e.g.*, *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980), its significance for the people of Alaska and its governing bodies is even more compelling.

Within Indian country, a Native government may have authority over a wide range of subjects, including management of fish and game, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983); regulation of economic relationships, *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and taxation "to raise revenues for its essential services," *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). See generally *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). Because a Native government may be authorized to tax entities doing business within its jurisdiction, Native governments can require financial contributions from companies extracting natural resources from land—a matter of extreme importance in Alaska. See *Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d 1531, 1538 (10th Cir. 1995).[4] The

[3] *Amici* have lodged with the Clerk of the Court as demonstrative aids two maps of the State of Alaska showing the lands selected by and/or conveyed to the village corporations and the locations of the Native villages.

[4] There is very little decisive case law on the certainty or totality of Native jurisdiction in these areas. *See* Felix S. Cohen, *Handbook of Federal Indian Law* chs. 4, 5 (1982 ed.). This makes the Ninth Circuit's decision all the more harmful to Alaska because it overlays the unsettled questions of state-tribal jurisdiction onto the amorphous jurisdictional inquiry into what constitutes Indian country now mandated by the court of appeals. The inevitable effect will be costly and unpredictable litigation.

holding below threatens severely to undermine the Legislature's ability to fulfill its constitutional mandate across a spectrum of areas in which it crafts laws for the benefit of the State and its citizens. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 209-10 (1987) (state precluded from enforcing "civil regulatory" statutes in Indian country).

a. The Alaska Constitution charges the Legislature with managing and preserving the State's abundant natural resources, and management of these resources is fundamental to the State of Alaska's ability to ensure the long-term health and stability of its economy and environment. This issue was of paramount importance to those who enabled Alaskan statehood. See Alaska Const. art. VIII; An Act to Provide for the Admission of the State of Alaska into the Union, Pub. L. No. 85-508, § 6, 72 Stat. 339, 340-41 (1958); *Udall* v. *Kalerak*, 396 F.2d 746 (9th Cir. 1968). The scope of the Legislature's responsibility in this area is as vast as the State itself, extending to management of, *inter alia*, fish and game, Alaska Stat. tit. 16, and public waterways, Alaska Const. art. VIII, §§ 13, 14; and maintenance of environmental quality standards, Alaska Stat. tit. 46. See Pet. 15-16.

Resource management is just one element of the Legislature's wide-ranging responsibility under the State Constitution to protect the environment for the benefit of all Alaskans. The decision below affects a panoply of state environmental statutes and regulations. See Pet. 15. One example is the creation and enforcement of environmental quality standards, where the ramifications of the Ninth Circuit's holding will extend beyond the boundaries of Indian country to envelop as well the surrounding communities. Disabling the State from enforcing ambient air or water quality standards in Indian country will affect people both within *and* without these jurisdictional boundaries.

b. One particular area where the impact of the holding below will be felt acutely is management of forest resources. The Legislature has devised a comprehensive scheme to administer and manage the State's forests, which "are among the most valuable natural resources of the state." Alaska Stat. § 41.17.010; see *id.* tit. 41, ch. 17 ("Forest Resources and Practices"). This chapter empowers the Commissioner of Natural Resources to adopt regulations covering an array of forest practices, *id.* § 41.17.080, including riparian management to protect fish habitats, *id.* §§ 41.17.115-.119; control of infestations and disease, *id.* § 41.17.082; harvesting practices, *id.* §§ 41.17.083, 41.17.090; and the use of potentially harmful chemicals, *id.* § 41.17.100. The Ninth Circuit's decision threatens to gut this vitally important aspect of the State's resource management program with respect to millions of acres. By divesting the Legislature of plenary authority in this area, the decision below may lead to clear cutting of forest areas with serious consequences, including destruction of wildlife habitats and hastening of soil erosion. This crippling of the Legislature's ability to preserve the State's ultimate resources—its lands, waters, and wildlife—warrants granting the petition.

c. Another area rife with confusion in the wake of the Ninth Circuit's decision is taxation. Tribes have some ability to tax people and entities doing business and owning property in Indian country. *Jicarilla Apache Tribe*, 455 U.S. 130; *Confederated Tribes of Colville*, 447 U.S. 134. There is, therefore, a corresponding diminishment of the State's ability realistically to tax persons, property, or businesses in Indian country. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832 (1982). The taxation issue is most stark in the instances where points of transit between commerce centers are potentially Indian country, such as Cantwell and Glennallen. These are bottlenecks—*i.e.*, points along the principal thoroughfares connecting the

origination and destination points of substantial commerce within the State. In these communities, Indian country classification may authorize the local Native governments to levy taxes upon the stream of commerce passing through the jurisdiction, Pet. App. 137a, thereby leaving the State powerless to protect that flow of commerce.

As the Ninth Circuit itself acknowledged, its decision imposes "a significant financial burden" on the State. Pet. App. 136a. Businesses justifiably will be reluctant to invest capital if they are subject to uncertain tax liabilities, resulting in a loss of valuable economic opportunity in areas that would benefit from such investment. And, with the Legislature's inability to predict with any certainty its tax liabilities to Native governments, it will be forced to manage the State's finances without reasonable certainty. The only certain result is a dramatic increase in litigation involving taxation of persons, businesses, and commerce in each of the 226 communities.[5] See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Here, as in *Yakima*, "[i]f the Ninth Circuit's [] test were the law, litigation would surely engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The confusion and uncertainty sown by the decision in this case warrant review by this Court.

d. In addition to creating enormous uncertainty for the State of Alaska and its legislature, the Ninth Circuit's decision will spawn needlessly divisive, complex, and expensive litigation in Alaska and every other State containing land now susceptible to classification as "Indian country" under the Ninth Circuit's *ad hoc* approach. Application of the Ninth Circuit's approach will potenti-

[5] A recent example is the Village of Kluti Kaah's effort to tax operation of the Trans-Alaska Pipeline. *Alyeska Pipeline Serv. Co.* v. *Kluti Kaah Native Village*, 101 F.3d 610 (9th Cir. 1996).

ally subject non-Natives and non-Indians to tribal jurisdiction within their communities. *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404, 1413 (1997). Ironically, the Ninth Circuit's decision furthers precisely the opposite objective from that motivating efforts by Congress and this Court to define Indian country, namely, avoiding confusion and promoting certainty with respect to spheres of jurisdiction. Felix S. Cohen, *Handbook of Federal Indian Law* 6 n.56 (1942 ed.) (goal of definition is to render "the limits of Indian country . . . at all times obvious and certain") (quoting H.R. Rep. No. 23-474, at 10 (1834)); *United States* v. *La Plant*, 200 F. 92, 94 (D.S.D. 1911) ("It is important to definitely know over what land the state courts have jurisdiction and over what land the federal courts have jurisdiction"). As illustrated by the State's petition, see Pet. 28-30, the jurisdictional confusion generated by the decision below warrants further review.

2. The Ninth Circuit decision not only creates enormous confusion and uncertainty for Alaska, but is also predicated on an erroneous view of the history of the relationship between Alaska Natives and the State government, including the regulatory role that the State has always exercised with respect to Alaska Natives and rural lands and the extent to which the State has provided extensive benefits and services to Native peoples and their rural communities. This history highlights the fact that the federal government has never had the pervasive "guardianship" relationship with respect to Alaska Native communities that is the benchmark of "dependent Indian community" status.

The unique relationship between Natives, the Territory and State, and the federal government reveals a dynamic fundamentally different from the relationship between Indians in the "lower 48" and the federal government, which has been marked by conflict, forced migration, and treaties made and broken. *United States* v. *John*, 437 U.S. 634, 638-47 (1978); Felix S. Cohen, *Handbook of Federal Indian Law* 62-127 (1982 ed.). This different political

and legal relationship is, in part, a product of the vast land area of Alaska and the resulting "relative lack of intense or continuous competition and conflict over land or resources." U.S. Dep't of the Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Sol. Mem. Op. 36975, at 16 (Jan. 11, 1993) ("DOI Op."); *Metlakatla Indian Community, Annette Islands Reserve* v. *Egan*, 369 U.S. 45, 50-51 (1962).

Alaska Natives historically have occupied a different position with respect to the federal government than Indians in the contiguous United States, and the federal government has not applied woodenly the lessons learned from past experience in Alaska. DOI Op., at 20-22. The federal government's policy toward Natives did not center upon the land they occupied because it was not a scarce resource under pressure from an expanding population. Federal legislation concerning Natives classified them not on the basis of tribal organization but, rather, as "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district." *Metlakatla Indian Community, Annette Islands Reserve* v. *Egan*, 362 P.2d 901, 918 (Alaska 1961) (describing Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a), *vacated on other grounds*, 369 U.S. 45 (1962). Thus, while various Acts of Congress recognized the existence of Native land claims, federal legislation did not place the federal government in a posture of superintendence over land occupied by Alaska's Natives. Instead, the federal government recognized the State as the primary actor in forging a social and political contract with Alaska Natives.

With the possible exception of the Metlakatla reservation in Southeast Alaska (the only Native reserve lands remaining after ANCSA, 43 U.S.C. § 1618(a)), the State, rather than the federal government, has always been recognized to have legal and political jurisdiction over Alaska Natives and their communities, as well as the land and re-

sources in and around those communities.[6] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 62-63 (1962). Although the Statehood Act preserved Alaska Native land claims by requiring a State disclaimer of right and title to such property, the disclaimer "by the State was a disclaimer of proprietary interest rather than governmental interest." *Id.* at 68-69.

The Ninth Circuit's decision pays no heed to this history and simply ignores the broad range of programs, benefits, and services that the State currently provides to Alaska Natives—including the people of Venetie. Certain of these initiatives are referenced in the decision by the District Court below, Pet. App. 62a-63a. They include programs tailored to the specific needs of Natives as well as more generic public welfare and assistance programs. See Pet. App. 67a & n.28. The State's abiding commitment to these programs, benefits, and services belies any notion that the Native Villages, including Venetie, are "dependent" on the federal government.

Under the Alaska Constitution, public education is a State responsibility. Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a State"). Because of that requirement, as interpreted by Alaska's courts and implemented in a State-wide settlement more than 20 years ago, the State has built modern public school facilities in all rural villages with

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[6] The Ninth Circuit's analysis of ANCSA was misguided from the beginning because it assumed as its point of departure that "Indian country" generally existed in Alaska prior to the enactment of ANCSA. Pet. App. 13a, 32a; *see Native Village of Stevens* v. *Alaska Mgmt. & Planning*, 757 P.2d 32, 35 (Alaska 1988) (" 'There is not now and never has been an area of Alaska recognized as Indian country with one possible exception' ") (quoting *Metlakatla*, 362 P.2d at 920); *United States* v. *Nelson*, 29 F. 202 (D. Alaska 1886) (recognizing that Congress had authority to declare parts of Alaska to be Indian country); *United States* v. *Kie*, 26 F. Cas. 776 (D. Alaska 1885); *United States* v. *Seveloff*, 27 F. Cas. 1021 (D. Or. 1872).

significant student populations, to minimize the need for rural, predominantly Native children to leave their homes and villages to obtain an education. See *Hootch* v. *Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975). The Legislature has appropriated tens of millions of dollars over the last 20 years for those construction efforts. See Alaska Stat. §§ 14.11.005-.135; Alaska Admin. Code ("AAC") tit. 4, ch. 33 (school capital grants program); 4 AAC 31 (school facility planning and construction). Ironically, this case arises out of Venetie's attempt to tax the construction of a public school at State expense. Pet. 38a, 87a. In addition, the State provides substantial operating funds for rural education under a public school funding formula. See Alaska Stat. tit. 14, ch. 17; 4 AAC 09 (school foundation funding formula). Those funds are provided to local school districts in areas of the State where these districts have been established, and otherwise through Regional Educational Attendance Areas in unorganized boroughs. Alaska Stat. §§ 14.08.011-.151, 14.12.010-.180.

The Legislature also has acted to meet other needs of Alaska's rural communities. The State has established programs for rural electrification projects (19 AAC 96.200-.260), utility improvement grants (19 AAC 97.300-.430), and electrical service extension grants (Alaska Stat. § 42.45.200; 19 AAC 97.500-.550). In addition, the State engaged in a power cost equalization grant program, which directly subsidizes the cost of electricity in rural areas. Alaska Stat. §§ 42.45.110-.190; 19 AAC 97.200-.270. Moreover, because of the expense of purchasing and storing bulk fuel for heating and electrical generation in rural areas, the State has established a bulk fuel loan program. Alaska Stat. §§ 42.45.250, 44.47.145; 19 AAC 96.300-.365.

The State has long had a revenue sharing program under which it distributes a significant amount of State revenues to municipal governments, unincorporated communities, and Native villages. Alaska Stat. tit. 29, ch. 60; 19

AAC 30, 44. In addition, the State has provided capital construction funding grants to many such communities. Alaska Stat. §§ 29.60.400-.440; *id.* tit. 37, ch. 6. The State also has development assistance programs targeted specifically to rural areas, including general rural development assistance (Alaska Stat. §§ 44.47.130-.140; 19 AAC 60), and a rural development initiative fund (Alaska Stat. §§ 44.47.800-.820; 19 AAC 70). See also Pet. App. 67a n.28.

Particularly telling in light of this broad-based legislative effort by the State is the Ninth Circuit's own statement that "[i]n many respects, the federal government has been replaced by either the State or the Tribe itself as the direct provider of services." Pet. App. 28a. This acknowledgement alone should have dispelled any notion that the Natives are "dependent" upon the federal government or that there exists federal superintendence over the Natives. See *supra* 8-11; Cohen, *supra* (1942 ed.), at 405.[7] Instead of according this history its appropriate weight, the Ninth Circuit embarked on a re-engineering of the "dependent Indian communities" inquiry that departs from the decisions of this Court and several courts of appeals.

3. The Court should grant review because the Ninth Circuit's decision is entirely at odds with this Court's prior decisions. *E.g.*, *United States* v. *Sandoval*, 231 U.S. 28, 40-41 (1913). The decision disregards the intent of Congress in enacting ANCSA *not* to create dependent, much

[7] ANCSA reaffirms this view, explicitly disavowing any "wardship" and seeking "maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). To support its contrary conclusion, the court below relied upon mere receipt of federal funds or assistance by the Natives of Venetie—*e.g.*, the federal government's continuing involvement in contributing money for the construction of airports—to show the Natives' dependence." *But see* DOI Op., at 116-17. As the State demonstrates, this analysis is in direct conflict with the First Circuit's decision in *Narragansett Indian Tribe* v. *Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996). Pet. 25-26.

less-exclusive jurisdictional, relationships between Alaska Natives and the federal government with respect to lands conveyed to State-chartered Native corporations.[8] Straying far afield from the decisions of this Court and other courts of appeals, Pet. 23-29, the Ninth Circuit's decision effects a sharp, unprecedented detour from the principle that the existence of a "dependent Indian community" hinges on Congressional and Executive branch intent that the federal government exercise primary superintendence over land set aside for the use and occupancy of an Indian tribe.

The Ninth Circuit eviscerated the historical touchstones of the "dependent Indian community" test, and its reformulated inquiry is so malleable as to be incapable of producing consistent—much less predictable—results. Pet. 29. The reference to "dependent Indian communities" in 18 U.S.C. § 1151 embodies a term of art rooted in this Court's decisions in *Sandoval*, 231 U.S. 28, and *United States* v. *McGowan*, 302 U.S. 535 (1938). In both cases, the Court described the Indians as truly "dependent"—*i.e.*, incapable of seeing to their own needs and reliant upon the federal government for protection. *McGowan*, 302 U.S. at 538 ("[t]he fundamental consideration . . . in establishing this colony has been the protection of a dependent people"); *Sandoval*, 231 U.S. at 40-41 (Pueblo Indians "are dependent upon the fostering care and protection of the Government"); see also *United States* v. *Chavez*, 290 U.S. 357, 361 (1933) (Pueblo Indians "are essentially a simple, uninformed and dependent people"); *United States* v. *Pelican*, 232 U.S. 442, 450 (1914) (" '[t]hese Indians are . . . in a condition of pupilage or dependency' ") (quoting *United States* v. *Rickert*, 188 U.S. 432, 437 (1903)). These and other cases formed the basis for the codification of "dependent Indian com-

[8] Indeed, Congress's decision in ANCSA to convey title to these Native-owned corporations *belies* any notion that Congress viewed the Natives as dependent.

munities" in the U.S. Code. Pub. L. No. 80-772, ch. 53, 62 Stat. 683, 757 (June 25, 1948) (codified at 18 U.S.C. § 1151 *et seq.*); see Reviser's Note to 1948 Act (referencing cases).

The Ninth Circuit's treatment of *Sandoval* illustrates the degree to which the Ninth Circuit has strayed from this Court's precedents. The Ninth Circuit relied on *Sandoval* for the proposition that Indian country may exist on lands held in fee simple by a tribe. Pet. App. 11a. But there, Congress had explicitly declared that the land at issue was Indian country, 231 U.S. at 37-38, continuing a long history of dependence between the Pueblo Indians and the federal government, *id.* at 47. This Court held in *Sandoval* that Congress was within its authority in classifying the lands as Indian country, and it emphasized that "the questions whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.* at 46-47. By contrast, the Ninth Circuit's decision foists an unprecedented and unwieldy methodology for determining the existence of Indian country onto courts to be applied on a case-by-case basis.

4. The Ninth Circuit did more than contravene this Court's precedents and deviate from the collective judgment of several courts of appeal; it plainly misinterpreted ANCSA. See 43 U.S.C. § 1601(b). Congress, with substantial input from Alaska Natives and State leaders, designed ANCSA to resolve fully claims of aboriginal title to land asserted by Alaska Natives in a manner that would "maxim[ize] participation by Natives in decisions affecting their rights and property" while not establishing "racially defined institutions . . . or lengthy wardship or trusteeship." 43 U.S.C. § 1601(a), (b). ANCSA's withdrawal of public lands and regime of conveying fee simple interests in lands to state-chartered corporations—rather than tribes—"reflect[ed] a new approach on an unprecedented scale in defining the relationship between Alaska Natives and the Federal Government." DOI Op., at 107. The Ninth Circuit disregarded this new approach, as well as the intent of Congress. *See County of Yakima*, 502 U.S. 251.

The patent conveyance regime conceived by ANCSA stands in sharp contrast to the *sine qua non* of Indian country—*viz.*, land set aside for the use of Indians under federal superintendence. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *McGowan*, 302 U.S. at 539; *Pelican*, 232 U.S. at 449 ("the original reservation was Indian country simply because it had been validly set aside for the use of the Indians as such, under the superintendence of the Government"); *Sandoval*, 231 U.S. at 40-41 (describing government actors as "superintendents"); *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913) (Indian country is "a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation"); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) ("crucial consideration" of dependent Indian community inquiry is "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples") (citations and internal quotation marks omitted).[9]

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[9] As demonstrated by the facts of this case, which are not in dispute (Pet. App. 26a n.5), each of the remaining 225 communities covered by ANCSA could organize a tribal government as a recipient for title to the land held by the Village corporations. Pet. App. 2a, 4a, 128a. While the conveyance of property from these corporations to Native villages may be permissible, it is inconceivable that Congress would have used this convoluted approach—*i.e.*, creating as recipients of title state-chartered corporations so that these corporations could convey title to the tribes—as the means of creating or preserving Native jurisdictional claims to land, much less that Congress would have done so had it intended to create "Indian country" in Alaska. In fact, Congress plainly intended no such result.

Congress intended in ANCSA for a settlement of Alaska Native land claims that departed from the historic reservation or trusteeship models and reaffirmed the absence of federal superintendence over the lands conveyed. See Pet. App. 23a (regional and village corporations "will not be subject to Federal supervision except to the limited extent provided in the bill") (quoting H.R. Rep. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2199). Instead, ANCSA provided for state-chartered regional and village corporations as recipients of title to the land conveyed under the Act. 43 U.S.C. §§ 1606, 1607. ANCSA disavowed the paternalistic scheme of federal supervision marking the federal government's relations with Indians in the lower 48 and manifested Congress's intent to *disclaim* federal superintendence over the land conveyed to those Native corporations. See DOI Op., at 121 ("It would be anomalous to conclude that Native Corporation lands are the jurisdictional equivalent of reservations, when Congress specifically abolished reservations and designed a comprehensive system of landholdings purposely intended not to be the functional equivalent of reservations").[10]

The Ninth Circuit's manipulation of the superintendence requirement emphasizes the need for this Court to address the increasing divergence in opinion among the courts of appeals as to the correct meaning of super-

[10] Other aspects of ANCSA make it clear that Congress did not intend to create Indian country in authorizing the conveyance of 1.2 million acres of lands to Village corporations in fee simple. For instance, ANCSA included specific provisions precluding State or local taxation of *undeveloped* settlement lands. 43 U.S.C. § 1620(d). If Congress intended ANCSA settlement lands to be Indian country, those provisions would be entirely unnecessary. *Cf. Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 613 (1977) ("most reasonable inference" from inclusion of prohibition of intoxicants on land in reservation opened by Congress "is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country,'" since intoxicants were generally prohibited in Indian country).

intendence in the Indian country context. Pet. 24-27. Indeed, the Ninth Circuit's decision conflicts with *Narragansett Indian Tribe* v. *Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996), where the First Circuit stated that "'[s]uperintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.'" 89 F.3d at 920 (quoting District Court's opinion in this case). See also *Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) ("Superintendency over the land requires the active involvement of the federal government"; Indian country did not exist where "[t]he federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land").

The historic jurisdiction of the State over Alaska Natives and their communities and surrounding lands, and the breadth and depth of the assistance that the State Legislature consistently has provided to the Natives and their villages—all of which the court below ignored—undermine the argument that the villages are in any sense "dependent" on, or under the superintendence of, the federal government. ANCSA was not intended to change the jurisdictional relationship between the State and the lands eventually selected and conveyed by patent. The State Legislature responded to ANCSA by providing important benefits for rural communities because Congress made clear that the federal government's role would be limited. By redefining these historic relationships based on a misreading of ANCSA, the court below has needlessly upset the economic and political situation in Alaska in a way that will generate extraordinary confusion and potentially will result in the Villages receiving fewer net benefits. Given that these potential consequences arise out of a clear disregard of Congress's intent, an exacerba-

tion of the division among the courts of appeals, and a departure from this Court's precedents, the Court should grant the petition, reverse the decision below, and reaffirm what has always been presumed to be true—that the State has paramount authority throughout all non-federal lands in Alaska.

* * * *

As Judge Fernandez observed, the Ninth Circuit has set the stage for a torrent of litigation. Pet. App. 35a. It has unleashed tremendous anxiety throughout the State of Alaska and beyond. The ultimate consequences of the decision below for Alaska and many other States are unknowable, but, in any event, the Alaska Legislature will be severely hampered in its ability to make meaningful laws that will have their intended effects. Issues as fundamental to the State as natural resource management and taxation cannot be resolved with any confidence concerning the efficacy of an adopted course of action and, instead, will be the subject of abiding litigation. Accordingly, the Court should provide further review and thereby spare Alaska and its citizens the disruption that invariably will flow from the court of appeals' ill-considered decision.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. COLE
406 Cushman Street
Fairbanks, Alaska 99701
(907) 452-1124

THE COUNCIL OF STATE GOVERNMENTS-WEST
KENT BRIGGS
Executive Director
121 Second Street,
Fourth Floor
San Francisco, CA 94105
(415) 974-6422

CARTER G. PHILLIPS *
CHRISTOPHER D. MOORE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Amici Curiae

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* Counsel of Record